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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-90
(Formerly No. 1412, O.T. 1970)

JOHN SCHILB, et. al.,

Plaintiffs-Appellants.

VS.

VINCENT P. KUEBEL, Clerk of the Circuit Court of St. Clair County, Illinois, et. al.,

Defendants-Appellees.

Appeal from the Supreme Court of Illinois

BRIEF FOR APPELLEES

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Illinois are reported at 46 Ill. 2d 538, 264 N.E. 2d 377 and at pp. 30-47 of the Appendix filed in this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Since these provisions are lengthy, they are only cited here. The full text of the provisions are printed in Appendix A to this brief.

UNITED STATES CONSTITUTION, AMENDMENT FOURTEEN.

Article 110 of the Illinois Code of Criminal Procedure (Ill. S.H.A., Bail, Ch. 38, Par. 110, et seq.)

United States Code, Title 18, Sec. 3146, Release in non-capital cases prior to trial.

STATEMENT OF THE CASE

The statement of the case contained in the Brief of the Appellants is correct, but omits these facts: That the named plaintiff never has alleged that he is indigent and that he did not apply for a release on his own recognizance.

SUMMARY OF ARGUMENT

The Illinois statutes regulating bail do not violate the Equal Protection Clause of the Fourteenth Amendment. Release, upon deposit of 10 per cent of the set bail, is a statutory right which, if exercised, grants a substantial benefit to an accused person. In return for the benefit granted and in view of the laudable purposes sought to be accomplished by the implementation of this reform legislation, the distinction created by the Illinois bail provisions are reasonable. Moreover, the 10 per cent deposit provision has been successful in its primary objective—

elimination of professional bondsmen from the bail system.

Further, the 10 per cent deposit provision does not discriminate against the poor. In fact, the statute not only lessens the inherent inequality between rich and poor in making bail, but it is good economic sense for rich and poor alike to utilize the 10 per cent deposit provision.

Finally, the 10 per cent deposit provision does not violate substantive due process. The percentage of the deposit retained by the clerk is an administrative charge. It is not a reimbursement for the cost of prosecution. The fact that the Federal government finances its bail system without like imposition of costs is not conclusive. The Illinois and Federal attempts at bail reform may both be constitutional.

ARGUMENT

INTRODUCTION

In 1954, pursuant to a suggestion of the Supreme Court of Illinois, the Illinois State and Chicago Bar Associations appointed a Joint Committee to Revise the Illinois Criminal Code. As a result of the work of this Committee, a substantive code of criminal law was adopted by the Illinois General Assembly, signed by the Governor, and became effective January 1, 1962.

With this first phase completed, the Committee turned its attention to the second phase of its original charge: drafting a new Code of Criminal Procedure. On January 1, 1964, the Committee's work reached fruition; the new Illinois Code of Criminal Procedure went into effect.

Article 110 of the Code of Criminal Procedure governs bail in criminal cases.[1] Beyond gathering all bail provisions into one section of the Illinois Statutes, the new provisions made substantive changes. One of these substantive changes is the basis for plaintiff, Schilb's, action.

The statutes under attack are set forth in Appendix A of this brief. In summary, they provide that an accused may receive pretrial release in one of three ways.

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1. Schilb was arrested for two traffic offenses. On petition for rehearing to the Supreme Court of Illinois, Schilb argued that Rule 526 of the rules of the Supreme Court of Illinois governed bail in certain minor traffic offenses. Since the petition for rehearing was denied without comment, we must assume the Supreme Conrt of Illinois decided that Article 110-7 of the Code of Criminal Procedure was correctly utilized in Schilb's situation.

1. An accused may be released on his own recognizance (Sec. 110-2). This section is to be liberally construed to effectuate the purpose of relying on criminal sanctions[2] instead of financial loss to assure the appearance of the accused.

2. An accused may deposit 10 per cent of the full amount of the bail. (Sec. 110-7.) When bail is made in this way, the clerk of the court shall retain as bail bond costs 10 per cent of the amount deposited by the accused. The remainder of the amount deposited is later applied to the payment of a judgment or returned to the accused.

3. In lieu of the 10 per cent bail deposit provided for above, the accused may secure an amount equal to the required bail of cash or stocks and bonds, or, in the alternative, secure double the amount of the required bail in unencumbered real estate (Sec. 110-8). If bail is made under this section, the clerk of court later refunds the entire amount secured to the accused, after deducting costs of a judgment, if any.

In determining the amount of the bail, the court is not bound to a fixed standard. However, Section 110-5 of the Code of Criminal Procedure sets out considerations which must be taken into account. These considerations were meant to be a codification of the present law. Moreover, provision is made for reduction of the bail bond. (Sec. 110-6.)

While Illinois does not compile reports of proceedings preliminary to the passage of a bill, there are clear indications of the reasoning involved in the above changes.

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2. As part of the general revision of the Criminal Code, bail jumping was made a separate criminal offense. Section 32-10 of the Criminal Code of 1961 (Ill. S.H.A., Ch. 38, Par. 32-10.)

The statutes, as adopted by the legislature, included almost verbatim the proposed bill of the Joint Committee to Revise the Illinois Criminal Code. The Committee Comments[3] set out the underlying premises. Moreover, the Chairman of the Committee explained the new provisions, especially the 10 per cent deposit provision, in a seminar and article.[4]

The Committee started with the fundamental principle underlying the granting of bail—a person accused of crime is presumed to be innocent until he is proven guilty beyond all reasonable doubt at trial. It took note that the practice of requiring a bond with sureties is premised upon the assumption that personal or family pecuniary loss will deter non-appearance. However, in modern practice it is not the accused, his family or friends who make the bond and suffer the loss for non-appearance, but professional bondsmen and insurance companies.

For years it had been recognized by common consent that a major evil in the American administration of justice was the professional bail bondsman.[5] Some of the more common abuses were overcharges of bail fees, taking security pledges and failing to return them to the owner and collecting money reimbursements for forfeited bond judgments which were later vacated.[6] Moreover, the al-

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3. Committee Comments, 1963 (Ill. S.H.A., Ch. 38, Par. 110 et seq., p. 298 et. seq.)

4. Bowman, The Illinois Ten Per Cent Bail Deposit Provision, 1965 Ill. Law Forum 35.

5. Beeley, The Bail System in Chicago, p. 39 (1927).

6. Freed and Wald, Bail in the United States: 1964, p. 34 (1964).

leged value of a bondsman being responsible for the appearance of an accused and tracking him down and returning him at the bondsman's expense is illusory. The great majority of bail jumpers are apprehended by the police.[7]

The bail bondsmen, not the judge or the accused, held the keys to the jail. They determined for whom they would act as surety—who in their judgment was a good risk. Not only defendants who were unable to pay the bondsmen's fees remained in jail. The bad risks who were able to pay the bondsmen's fee—but not the full amount of the bail also remained in jail.

Prior to 1963, the system for making bail worked as follows: Bail would be set for an accused. If the accused or his family could secure the full amount of the bail, the accused would be released. If the accused or his family could not secure the full amount of the bail, the professional bail bondsman would enter the picture.[8] The professional bondsman would secure the full amount of bail for a price.[9] The going rate in Illinois in 1963 was the

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7. Committee Comments, 1963 (Ill. S.H.A., Ch. 38, Par. 110 et seq., p. 300).

8. In practice, he would be lurking in or about the courtroom or police station. See R. Goldfarb, Ransom, p. 92-126 (1965) for a complete discussion of the evil practices of bailbondsmen.

9. This could be done by the bondsmen simply signing a power of attorney on their bonds. Now bailbondsmen are prohibited from utilizing the 10 per cent deposit section, and they find it unecomomical to encumber one hundred per cent of the bond in cash or securities or double the amount of the bond in real estate. Boyle, Bail under the Judicial Article, 17 De Paul Law Review 267, 273 (1968).

statutory maximum—10 per cent of the amount of the bail. No refund of this 10 per cent was made by the surety to the accused for his routine compliance with the conditions of his bond.[10]

The 10 per cent bail deposit has completely replaced the bond writing activities of professional bondsmen. In 1966, no professional bonds were written for the Municipal Court of Chicago.[11] In some downstate counties of Illinois, no professional bonds have been written since the new provisions went into effect in 1963. More importantly, it appears that the 10 per cent system has had two additional positive effects. First, the bail forfeiture rate has decreased. Second, the jail population—at least before the astounding increase in the crime rate—has been reduced.[12]

As Professor Bowman, Chairman of the Joint Committee to Revise the Illinois Criminal Code, stated in a seminar on the product of his Committee:

> "It is certainly true, as stated yesterday by Mr. Wright, that the 10 per cent provision in Illinois and the Vera Foundation type investigative project are not the answer to the bail problems of the indigent and the serious offender. It was not anticipated in either case that they would be. However, experience in New York under that Vera project, and experience in Illinois under the 10 per cent provision prove that both are effective in their respective areas—the Vera type investigation aids the indigent in securing release, and the Illinois 10 per cent provision reduces the cost of liberty to those who can afford 10 per cent to a bondsman or to the clerk." (1965 Univ. of Ill. Law Forum, at 40).

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10. A. Kamin, Bail Administration in Illinois, 53 Ill. Bar Journal, 674, 678 (1965).

11. Boyle, supra note 9, at 274.

12. Bowman, supra note 4, at 35-40; Boyle, supra note 9, at 274-275.

I.

IMPOSITION OF A FEE ONLY AGAINST THOSE WHO OBTAIN PRE-TRIAL RELEASE BY DEPOSITING 10 PER CENT OF THE AMOUNT OF A REASONABLE BOND DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In Illinois, accused persons who are released on their own recognizance pay no fee for the processing of their bonds. Those who are released upon deposit of 100 per cent of the amount of the bail in cash or stocks or 200 per cent of the amount of the bail in real estate pay no fee for the processing of their bonds. To do so would be a violation of substantive due process for the State would be conditioning the exercise of a constitutional right upon the payment of a fee. See: *Boddie* v. *Connecticut*, —— U.S. ——, 28 LEd 2d 113, 116, 117 (1971).

An accused may also secure release in Illinois by depositing 10 per cent of the amount of the bail with the clerk of the court. If this method is utilized, when the conditions of the bond have been fulfilled, the clerk will retain, as costs of processing the bond, 10 per cent of the amount deposited (or 1 per cent of the amount of the set bail). The retention of a portion of the amount deposited does not result in a conditioning of the exercise of a constitutional right upon the payment of a tax, however. The constitutional right is to secure release upon the payment of a reasonable amount of bail. The

Constitution does not require release upon the payment of a portion of a reasonable amount of bail.[13]

In this case Illinois has released an accused for substantially less than what the Constitution permits and a judge has found reasonable. Plaintiff has not exercised his constitutional right to freedom upon the payment of a reasonable amount of bail. He has exercised a statutory right to release at 10 per cent of the Constitutional requirement. Therefore, plaintiff is in a radically different position from a person who has exercised his constitutional right to bail.

In *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966), this Court held that financial burdens could not be imposed on one class of appellants—unsuccessful appellants who are confined in institutions—as opposed to all other classes of appellants. A New Jersey statute required this single class of unsuccessful appellants to reimburse the state for the cost of a transcript of the trial court proceedings. This Court found that all appellants received the same benefit—a verbatim transcript—and there was no defensible State interest which could be served by focusing on whether an appellant had been sentenced to a term in jail or merely fined. 384 U.S. 309.

In this case the person utilizing the 10 per cent system receives a substantially different benefit than the person depositing the full amount. For example, A and

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13. Plaintiff does not allege that the amount of the set bail in this case is unreasonable. In the absence of such allegation, it must be assumed that the amount of the set bail was constitutional. Illinois provides for a method to reduce bail. Section 110-6, Illinois Code of Criminal Procedure. Plaintiff in this action did not make a motion to reduce the amount of the bail.

B are both similarly situated. Reasonable bail has been set for both at $1,000. Both own no stock or real estate. Both can secure $100 as bail but are unable to deposit the full amount—$1,000. Both will later be found innocent of the charges brought against them. A elects to seek release by utilizing the 10 per cent deposit provision. B chooses not to use the provision.

A receives substantial benefits which are not afforded to B. A will be released at 10 per cent of what is a reasonable bond. B is faced with a dilemma. He may sit in jail pending a determination of his case. Or, if he decides to exercise his constitutional right, he will have to make bail through a professional bailbondsman. The professional bondsman will retain as a bail fee the *entier* $100.[14] That amount will not be returned to B. It is his price for exercising a constitutional right. A, however, in addition to being allowed release at less than his constitutional right will have $90 returned to him. He has been granted

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14. 10 per cent was the maximum bailbondsmen could charge under Illinois law when the 10 per cent provision went into effect. As is often the case, the maximum was the going rate. That provision is still in effect. Ch. 16, Par. 62(d), Ill. Rev. Stat. (1969). However, bailbondsmen have found it uneconomical to write bonds in criminal cases since the Supreme Court of Illinois in *People ex. rel. Gendron* v. *Ingram*, 34 Ill. 2d 623 (1966) ruled that deposit of the amount of security must be made to the clerk of the court even though a surety company has adequate securities on deposit with the State Director of Insurance. See Boyle, Bail Under the Judicial Article, 17 De Paul Law Review 267, 273, 274 (1968). As a practical matter, B would be unable to obtain release by pledging the full amount of the bail. He would sit in jail until found innocent.

substantial benefits by utilizing the 10 per cent deposit system.

As this Court stated in *Rinaldi* v. *Yeager* at 384 U.S. 309:

> "To be sure, the constitutional demand (Equal Protection) is not a demand that a statute necessarily apply equally to all persons. 'The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same.' (Citation.) Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have some relevance to the purpose for which the classification is made." (Insertion for clarity.)

The 10 per cent deposit system was not intended to secure pre-trial release for all defendants. It was intended to reduce the power of the bailbondsmen in the bail process and to diminish the financial burden on those who were forced to seek release through the professional bailbondsman. Sec. 110-7 imposes a special burden upon those who utilize it. However, in light of the obvious relevance to those laudable purposes, the classification system must be found reasonable.

The legislature intended to give the moderately poor an opportunity for release which was not previously available—and at a cost (special burden) far below the then prevailing rate. A cost which rewards compliance by refunding 90 per cent of the deposit. This is in marked contrast to the old system which doubly penalized moderately poor defendants who complied with the conditions of their bond. They (1) paid an exorbitant bond fee, often more than the 10 per cent legal limit, and, (2) they

received nothing back when they complied by appearing in court.

All sound social, economic and political (in the classic sense of the word) factors being considered, the classification system is reasonable.

II.

THE ILLINOIS BAIL DEPOSIT PROVISIONS WERE NOT INTENDED TO BENEFIT THE TRULY INDIGENT. IN PRACTICE, THEY DO NOT CREATE CLASSES, BUT ATTEMPT TO ALLEVIATE PROBLEMS IN THE CLASSES WHICH WERE EXISTING AT THE TIME THEY WERE ADOPTED.

"The amount of bond shall be . . . (5) considerate of the financial ability of the accused." Section 110-5, Illinois Code of Criminal Procedure (Ill. S.H.A. Ch. 38, Par. 110-5).

In setting the amount of the bail, a judge should take into account many factors. The fixing of bail for any individual defendant must be based upon standards relevant to the basic purpose of assuring the presence of that defendant on his designated court date. *Stack* v. *Boyle*, 342 U.S. 1, 342 U.S. 1 (1951). Financial ability to make the set bail is only one of the considerations—albeit a quite important one. Inability to make bail has consequences in excess of denial of freedom.[15] However, this Court has held that mere inability to make the set bail does not mean the set bail is excessive. *Hodgson* v. *U.S.*, 365 F. 2d 679, 687 (8th Cir. 1966), cert. denied 385 U.S.

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15. See La Fave, Alternatives to the Present Bail System, 1965 Ill. Law Forum 8, 10-11.

1029 (1967); *U. S.* v. *Radford,* 361 F. 2d 777, 781 (4th Cir. 1966) cert. denied 385 U.S. 877 (1967).

Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release. *Bandy* v. *U.S.*, 81 S. Ct. 197, 5LEd 2d 218, 219 (1960).[16]

Plaintiff alleges that the Illinois bail provisions discriminate against indigent defendants. On their face, the provisions do not discriminate against poor people. In practice, such is not the case any more than it is the case without a 10 per cent provision. Moreover, if this Court finds the 10 per cent provision to be unconstitutional, poor people will not be benefitted. On the contrary, they will clearly be harmed.

The provisions allow *all* defendants to utilize the 10 per cent provision. The trial court judge has no discretion in the matter. More options may be open to a rich defendant than a poor defendant, but wherever property is a criterion, he who has more property has more options open to him.

Without the 10 per cent provision, a rich man could make bail by depositing the full amount of the set bail. He need not visit a bondsman. A moderately poor man would end up forfeiting 10 per cent of his bond—in practice, usually more—as a fee to a professional bondsman

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16. In a sequel to this opinion Justice Douglas in *Bandy* v. *U. S.*, 82 S. Ct. 11, 7 L. Ed. 9, 11 (1961) decided that no man should be denied release because of indigence. Instead, other factors making it reasonable to believe that a man will comply with court orders, he should be released on his own recognizance. It does not appear that the plaintiff in this case, Schilb, requested a release on his own recognizance as provided by Ill. S.H.A. Ch. 38, Paragraphs 110-2, 110-6.

or remaining in jail. The really indigent defendant would not even be given the choice of forfeiting collateral or remaining in jail. Since he could not pay the bondsman 10 per cent of the amount of the bail, he was forced to remain in jail pending his trial. If later found innocent, he has truly suffered.

The 10 per cent provision does not help the completely indigent defendant. He is still forced to stay in jail due to his indigence. However, the moderately indigent defendant receives an additional alternative. He may now obtain release with forfeiture of only one per cent of the amount of bail. The rich defendant also receives an additional benefit.

Statistics show that in practice *regardless of an individual's financial status* he will post the full amount of bail when the amount of the bond is $25.00 or less and will utilize the 10 per cent deposit provision when the amount of the bond is over $25.00.

The following is a summation of statistics for the six month period of July-December 1969 inclusive. The figures represent all of the "C" (100 per cent) and "D" (10 per cent deposit) bonds written in Cook County for that period. See Appendix B to this brief for the exact figures.

Amount of Bail Equal to or Under $25.00

Total no. of "C" bonds	89,340
Total no. of "D" bonds	0

Therefore, 100 per cent of the people who are charged with a bailable offense and who are required to post a bond of $25.00 or less will deposit the full amount.

Amount of Bail over $25.00

Total no. of "C" bonds	6,923
Total no. of "D" bonds	63.300

Therefore, 90.2 per cent of the people who are charged with a bailable offense and who are required to post a bond in excess of $25.00 will utilize the 10 per cent deposit system.[16]

The following example might best illustrate why 90.2 per cent choose a "D" Bond when the amount of their bail is over $25.00:

Suppose "A" a financially well-to-do gentleman was required to post a bail bond in the amount of $1,000.00. He would thus have a choice of posting the full cash amount under Par. 110-8 or deposit 10 per cent under Par. 110-7, in which case a 1 per cent fee would be deducted.

Example 1. If "A" chose to deposit 10 per cent, he need only post $100.00. The remaining $900.00 could then realistically be invested to draw 5 per cent interest. After "A" was discharged from his obligations under the bond he would be required to pay a 1 per cent fee or $10.00. Thus "A" would have benefited by deposting the 10 per cent under Par. 110-7;

i.e.

$900.00	
.05	(5% interest per 1 year)
45.00	
-10.00	(1% fee)
$ 35.00	net gain

16. In this 9.8% are those people who are *required* to post a *mandatory* cash bond under Supreme Court Rule 526. After much discussion on this point with various individuals in the office of the Clerk of the Circuit Court, it is our opinion that the number of individuals that are *required* to post a *mandatory* cash bond amounts to one-half of the 9.8% posting "C" Bonds. See Rule 526 of the Rules of the Supreme Court of Illinois (Ill. S.H.A. Rules, Ch. 110A, Par. 526).

"A" would thus stand to make a gain unless the matter was disposed of *within* a three month period:

i.e.	$900.00	
	.0125	(5% interest for 3 months)
	11.25	
	-10.00	(1% fee)
	$ 1.25	net gain

Only a very small fraction of those cases requiring bonds in excess of $25.00 are disposed of (and without a subsequent appeal) within a three-month period.

Example 2. Note that if a "C" bond were posted, although a 1 per cent fee was not charged, the $900.00 would not be available for investment since the full amount of $1,000.00 would have had to been posted.

These examples adequately show why 90.2 per cent choose a "D" bond when the amount of the bail is in excess of $25.00.

Therefore, plaintiff-appellant's argument that those individuals who are moderately poor (those who lack sufficient property to obtain release under Par. 110-8) have no "choice" is without merit. For any individual, even if he did have sufficient property to obtain release under Par. 110-8, would not choose to post a full cash bond as shown by an overwhelming 90.2 per cent of the individuals choosing to post a "D" bond.

The practical effect of Section 110-7 is not to create "classes" on the basis of wealth.

Finally, it is interesting that the pleadings tell nothing of the financial situation of the named plaintiff, Schilb.

He seeks to represent indigents, yet he does not allege that he is, in fact, indigent. There is no evidence to show that he was unable to deposit the full amount of bail. Perhaps he is similar to the many affluent individuals in Cook County who—after weighing the economics of the situation—freely decide to utilize the 10 per cent provision.

A declaration that the Illinois 10 per cent provision is unconstitutional will not help indigent defendants. It would be a step backwards. More moderately indigent defendants would remain incarcerated prior to trial without the present reform provisions. A further increase in the jail population would benefit neither the State nor the jail population. It would result in greater expense to the State and increased suffering for those defendants who would be forced to remain in jail pending their trial.

While the Illinois legislature might one day pass further bail reform legislation to benefit the completely indigent defendant, it has not yet taken that step. State legislatures traditionally have been allowed to take reform "one step at a time," addressing whatever phase of the problem seems most acute to the legislature, *Williamson* v. *Lee Optical*, 348 U.S. 483, 489 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed to cover every evil that might conceivably be attacked. *McDonald* v. *Board of Election*, 394 U.S. 802, 809 (1969).

The 10 per cent provisions were directed at the evils of the bailbondsmen. They were not intended to benefit the completely indigent. Perhaps a later statute will attack that phase of bail reform. However, the state has a compelling interest in securing a defendant's appearance and

submission to the judgments of its courts. *Reynolds* v. *U.S.*, 80 S. Ct. 30, 32, 4 L. Ed. 2d 46 (1959). Except for the universal release on recognizance, bail has always been utilized. Since it assumes that an individual owns property, there is a built-in inequality. That inequality will not be obviated until the net worth of all men is equal. Only then will bail affect all men equally. Meanwhile, the 10 per cent provision is a realistic and reasonable arrangement to minimize now otherwise inevitable inequity.

III.

ALL INDIVIDUALS WHO UTILIZE THE TEN PER CENT DEPOSIT PROVISIONS TO OBTAIN PRETRIAL RELEASE MAY BE CHARGED A FEE.

If an accused person is found innocent after utilizing the ten per cent deposit provision he is still assessed ten per cent of the deposit (or one per cent of the amount of the bail) as costs of administration. Plaintiff argues that such a practice violates substantive due process.

In support of his contention plaintiff cites *Giacco* v. *Pennsylvania*, 382 U.S. 399 (1966). He does not rely on the majority opinion but on the concurring opinions of Mr. Justice Stewart and Mr. Justice Fortas. The majority opinion found a Pennsylvania statute requiring an innocent person to pay for the costs of prosecution void for vagueness. The concurring opinions would have reached the merits while declaring the statute unconstitutional.

Under Illinois law an assessment of court costs against a discharged defendant is not permitted. *Wells* v. *McCullock*, 13 Ill. 606 (1852). The Supreme Court of Illinois found that costs imposed under Section 110-7 were not court costs, but administrative charges. 46 Ill. 2d 551, 552.

Therefore, *Giacco* is totally inapplicable to the present situation. The situation presented in *Giacco* would never arise in Illinois.

The basic difference between the situation in *Giacco* and the situation here presented, is that in *Giacco* the state was attempting to assess costs of *prosecution* upon an innocent defendant. Here, the state is imposing an administrative cost incidental to the prosecution. The state is not being reimbursed for time and expenses of the judge and prosecutor. It is being reimbursed for its administrative costs in granting an accused his statutory privilege to pretrial release at substantially less than the constitutional minimum.

Plaintiff asserts that any cost attendant to a criminal proceeding may not be imposed on an innocent accused. This Court has never decided that question. The argument is based on the following reasoning: an accused has no "say so" in whether or not he is charged. If he is eventually found innocent, why should he bear any expense?

Plaintiff's argument can logically be extended to attorney's fees and loss of wages while incarcerated and in court presenting evidence. Plaintiff's argument might also be extended to the payment of fees to professional bail-bondsmen as was the case prior to the present reform, Must the state reimburse an accused person who is found innocent for these costs attendant to a criminal prosecution? We submit that there are certain costs which must be borne by people found innocent after trial. Such costs are the price of our system of criminal justice which is necessarily imperfect because it is operated by human beings. The law provides a remedy for false arrest and violations of civil rights. However, in cases where the

state has acted with proper cause in charging a person with a crime, the administrative costs incidental to obtaining release at less than the constitutional minimum are not prohibited by the Due Process Clause.

Plaintiff emphasizes that under the Federal Bail Reform Act (18 U.S.C. 3142-3152) release may be secured upon deposit of ten per cent of the set bail and, when the conditions of the bond have been met, the entire amount will be refunded. 18 U.S.C. 3146(a)(3). Further, plaintiff states that the Federal system only departs from the Illinois system in that one area. The second statement is wrong. There are important substantive differences between the Illinois and Federal statutes. Also, each was designed to meet different problems.

The Federal Bail Reform Act was not designed to eliminate professional bailbondsmen. It was designed to assure that all persons, if at all possible, be released from jail pending their appearance in court. The Federal system is both more and less restrictive in its treatment of the accused than the Illinois system.

In Illinois, when a judge sets an amount of bail, his role with the relation to the release of the defendant ends in most cases. If an accused wishes to obtain release upon deposit of ten per cent, the judge may not forbid him from doing so. However, in the Federal system, the district court judge may, in his discretion, require the full amount of the bond be deposited in cash or securities. 18 USC 3146(a)(4). Moreover, the district court judge may also impose any other condition deemed reasonably necessary to assure appearance, including a condition requiring an accused to spend every evening prior to trial in jail. 18 USC 3146(a)(5). The Illinois judge has no such discretion.

The point of the above discussion is this: there may be more than one constitutional method of reforming a bail system. While one legislative authority might deem it best that a judge be given broad discretion in setting conditions of bond, another might not want to place such far-reaching power in a judge's hands. It may wish to restrict him to setting a reasonable amount of bail. Both can be constitutional.

This Court has stated, in *Ownbey* v. *Morgan*, 256 U.S. 94 110, 111 (1921), a case where Delaware required a non-resident to give security in the value of property attached as a condition of appearing in and defending a suit, that the "due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall."

In the area of bail reform, states should be given broad scope to experiment with solutions to the admittedly complex problems. Their approaches should not be struck down as unconstitutional merely because this Court feels they are unwise or that a different system has more benefits. Illinois has taken an enlightened position regarding bail reform. The fact that the Federal government has adopted a different enlightened position does not mean that the Illinois plan is unconstitutional.

CONCLUSION

It would indeed be ironic that a bail reform system which reduces the financial burdens of defendants who are not able to post the full amount of their set bail is held unconstitutional because it discriminates against them. For the above reasons the decision of the Supreme Court of Illinois, upholding the challenged aspects of the Illinois bail reform system, should be affirmed.

Respectfully submitted,

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Date: August 21, 1971.

APPENDIX A

Amendment XIV

Constitution of the United States

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the

United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ILLINOIS CODE OF CRIMINAL PROCEDURE
ARTICLE 110. BAIL

110—1. § 110.1 **Definitions.)** (a) "Security" is that which is required to be pledged to insure the payment of bail.

(b) "Surety" is one who executes a bail bond and binds himself to pay the bail if the person in custody fails to comply with all conditions of the bail bond.

110—2. § 110-2. **Release on Own Recognizance.)** When from all the circumstances the court is of the opinion that the accused will appear as required either before or after conviction the accused may be released on his own recognizance. A failure to appear as required by such recognizance shall constitute an offense subject to the penalty provided in Section 32—10 of the "Criminal Code of 1961," approved July 28, 1961, as heretofore and hereafter amended, for violation of the bail bond, and any obligated sum fixed in the recognizance shall be forfeited and collected in accordance with sub-section (g) of Section 110—7 of this Code.

This Section shall be liberally construed to effectuate the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of the accused.

110—3. § 110-3. **Issuance of Warrant.)** Upon failure to comply with any condition of a bail bond or recognizance the court having jurisdiction at the time of such failure may, in addition to any other action provided by law, issue a warrant for the arrest of the person at liberty on bail or his own recognizance.

110—4. § 110-4. **Bailable Offenses.)** (a) All persons shall be bailable before conviction, except when death is a possible punishment for the offense charged and the proof is evident or the presumption great that the person is guilty of the offense.

(b) A person charged with an offense for which death is a possible punishment has the burden of proof that he should be admitted to bail.

110—5. § 110-5. **Determining the Amount of Bail.)** (a) The amount of bail shall be:

(1) Sufficient to assure compliance with the conditions set forth in the bail bond;

(2) Not oppressive;

(3) Commensurate with the nature of the offense charged;

(4) Considerate of the past criminal acts and conduct of the defendant;

(5) Considerate of the financial ability of the accused.

(6) When a person is charged with an offense punishable by fine only the amount of the bail shall not exceed double the amount of the maximum penalty.

(c) When a person has been convicted of an offense and only a fine has been imposed the amount of the bail shall not exceed double the amount of the fine.

110—6. § 110-6. **Reduction or Increase of Bail.)**

(a) Upon application by the State or the defendant the court before which the proceeding is pending may increase or reduce the amount of bail or may alter the conditions of the bail bond.

(b) Reasonable notice of such application by the defendant shall be given to the State.

(c) Reasonable notice of such application by the State shall be given to the defendant, except as provided in subsection (d).

(d) Upon verified application by the State stating facts or circumstances constituting a breach or a threatened breach of any of the conditions of the bail bond the court may issue a warrant commanding any peace officer to bring the defendant without unnecessary delay before the court for a hearing on the matters set forth in the application. At the conclusion of the hearing the court may enter an order authorized by subsection (a).

110—7. § 110-7. Deposit of Bail Security.)

(a) The person for whom bail has been set shall execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10% of the bail, but in no event shall such deposit be less than $25.

(b) Upon depositing this sum the person shall be released from custody subject to the conditions of the bail bond.

(c) Once bail has been given and a charge is pending or is thereafter filed in or transferred to a court of competent jurisdiction the latter court shall continue the original bail in that court subject to the provisions of Section 110-6 of this Code.

(d) After conviction the court may order that the original bail stand as bail pending appeal or deny, increase or reduce bail.

(e) After the entry of an order by the trial court allowing or denying bail pending appeal either party may apply to the reviewing court having jurisdiction or to a justice thereof sitting in vacation for an order increasing

or decreasing the amount of bail or allowing or denying bail pending appeal.

(f) When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause the clerk of the court shall return to the accused, unless the court orders otherwise, 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited. However, in no event shall the amount retained by the clerk as bail bond costs be less than $5.

At the request of the defendant the court may order such 90% of defendant's bail deposit, or whatever amount repayable to defendant from such deposit, to be paid to defendant's attorney of record.

(g) If the accused does not comply with the conditions of the bail bond the court having jurisdiction shall enter an order declaring the bail to be forfeited. Notice of such order of forfeiture shall be mailed forthwith to the accused at his last known address. If the accused does not appear and surrender to the court having jurisdiction within 30 days from the date of the forfeiture or within such period satisfy the court that appearance and surrender by the accused is impossible and without his fault the court shall enter judgment for the State if the charge for which the bond was given was a felony or misdemeanor, or if the charge was quasi-criminal or traffic, judgment for the political subdivision of the State which prosecuted the case, against the accused for the amount of the bail and costs of the court proceedings. The deposit made in accordance with subsection (a) shall be applied to the payment of costs. If any amount of such deposit remains after the payment of costs it shall be applied to payment of the judgment and transferred to

the treasury of the municipal corporation wherein the bond was taken if the offense was a violation of any penal ordinance of a political subdivision of this State, or to the treasury of the county wherein the bond was taken if the offense was a violation of any penal statute of this State. The balance of the judgment may be enforced and collected in the same manner as a judgment entered in a civil action.

(h) After a judgment for a fine and court costs or either is entered in the prosecution of a cause in which a deposit had been made in accordance with subsection (a) the balance of such deposit, after deduction of bail bond costs, shall be applied to the payment of the judgment.

110—8. § 110-8. Cash, Stocks, Bond and Real Estate as Security for Bail.) (a) In lieu of the bail deposit provided for in Section 110—7 of this Code any person for whom bail has been set may execute the bail bond with or without sureties which bond may be secured:

(1) By a deposit, with the clerk of the court, of an amount equal to the required bail, of cash, or stocks and bonds in which trustees are authorized to invest trust funds under the laws of this State; or

(2) By real estate situated in this State with unencumbered equity not exempt owned by the accused or sureties worth double the amount of bail set in the bond.

b) If the bail bond is secured by cash or stocks and bonds the accused or sureties shall file with the bond a sworn schedule which shall contain:

(1) A list of the stocks and bonds deposited describing each in sufficient detail that it may be identified;

(2) The market value of each stock and bond;

(3) The total market value of the stocks and bonds listed;

(4) A statement that the affiant is the sole owner of the stocks and bonds listed and they are not exempt from execution;

(5) A statement that such stocks and bonds have not previously been used or accepted as bail in this State during the 12 months preceding the date of the bail bond; and

(6) A statement that such stocks and bonds are security for the appearance of the accused in accordance with the conditions of the bail bond.

(c) If the bail bond is secured by real estate the accused or sureties shall file with the bond a sworn schedule which shall contain:

(1) A legal description of the real estate;

(2) A description of any and all encumbrances on the real estate including the amount of each and the holder thereof;

(3) The market value of the unencumbered equity owned by the affiant;

(4) A statement that the affiant is the sole owner of such unencumbered equity and that it is not exempt from execution;

(5) A statement that the real estate has not previously been used or accepted as bail in this State during the 12 months preceding the date of the bail bond; and

(6) A statement that the real estate is security for the appearance of the accused in accordance with the conditions of the bail bond.

(d) The sworn schedule shall constitute a material part of the bail bond. The affiant commits perjury if in the sworn schedule he makes a false statement which he does not believe to be true. He shall be prosecuted and punished accordingly, or, he may be punished for contempt.

(e) A certified copy of the bail bond and schedule of real estate shall be filed immediately by the court in the office of the registrar of titles or recorder of deeds of the county in which the real estate is situated and the State shall have a lien on such real estate from the time such copies are filed in the office of the registrar of titles or recorder of deeds. The registrar of titles or recorder of deeds shall enter, index and record (or register as the case may be) such bail bonds and schedules without requiring any advance fee, which fee shall be taxed as costs in the proceeding and paid out of such costs when collected.

(f) When the conditions of the bail bond have been performed and the accused has been discharged from his obligations in the cause, the clerk of the court shall return to him or his sureties the deposit of any cash, stocks or bonds. If the bail bond has been secured by real estate the clerk of the court shall forthwith notify in writing the registrar of titles or recorder of deeds and the lien of the bail bond on the real estate shall be discharged.

(g) If the accused does not comply with the conditions of the bail bond the court having jurisdiction shall enter an order declaring the bail to be forfeited. Notice of such order of forfeiture shall be mailed forthwith by the clerk of the court to the accused and his sureties at their last known address. If the accused does not appear and surrender to the court having jurisdiction within 30 days

from the date of the forefeiture or within such period satisfy the court that appearance and surrender by the accused is impossible and without his fault the court shall enter judgment for the State against the accused and his sureties for the amount of the bail and costs of the proceedings.

(h) When judgment is entered in favor of the State on any bail bond the State's Attorney shall have execution issued on the judgment forthwith and deliver same to the sheriff to be executed by levy on the cash, stocks or bonds deposited with the clerk of the court and the real estate described in the bail bond schedule. The cash shall be used to satisfy the judgment and costs and paid into the treasury of the municipal corporation wherein the bail bond was taken if the offense was a violation of any penal ordinance of a political subdivision of this State, or into the treasury of the county wherein the bail bond was taken if the offense was a violation of any penal statute of this State. The stocks, bonds and real estate shall be sold in the same manner as in execution sales in civil actions and the proceeds of such sale shall be used to satisy all court costs, prior encumbrances, if any, and from the balance a sufficient amount to satisfy the judgment shall be paid into the treasury of the municipal corporation wherein the bail bond was taken if the offense was a violation of any penal ordinance of a political subdivision of this State, or into the treasury of the county wherein the bail bond was taken if the offense was a violation of any penal statute of this State. The balance shall be returned to the owner. The real estate so sold may be redeemed in the same manner as real estate may be redeemed after judicial or execution sales in civil actions.

(i) No stocks, bonds or real estate may be used or accepted as bail bond security in this State more than once in any 12 month period. As amended by act approved July 31, 1967. L 1967, p. ——, H.B. No. 862.

110—9. § 110-9. Taking of Bail by Peace Officer.) When bail has been set by a judicial officer for a particular offense or offender any sheriff or other peace officer may take bail in accordance with the provisions of Section 110—7 or 110—8 of this Code and release the offender to appearance in accordance with the conditions of the bail bond, the Notice to Appear or the Summons. The officer shall give a receipt to the offender for the bail so taken and within a reasonable time deposit such bail so taken and within a reasonable time deposit such bail with the clerk of the court having jurisdiction of the offense.

110—10. § 110-10. Conditions of Bail Bond.) (a) If a person is admitted to bail before conviction the conditions of the bail bond shall be that he will:

(1) Appear to answer the charge in the court having jurisdiction on a day certain and thereafter as ordered by the court until discharged or final order of the court;

(2) Submit himself to the orders and process of the court; and

(3) Not depart this State without leave.

(b) If the defendant is admitted to bail after conviction the conditions of the bail bond shall be that he will:

(1) Duly prosecute his appeal;

(2) Appear at such time and place as the court may direct;

(3) Not depart this State without leave of the court and

(4) If the judgment is affirmed or the cause reversed and remanded for a new trial, forthwith surrender to the officer from whose custody he was bailed.

110—11. § 110-11. **Bail on a New Trial.)** If the judgment of conviction is reversed and the cause remanded for a new trial the trial court may order that the bail stand pending such trial, or reduce or increase the bail.

110—12. § 110-12. **Notice of Change of Address.)** A person who has been admitted to bail shall give written notice to the clerk of the court before which the proceeding is pending of any change in his address within 24 hours after such change.

110—13. § 110-13. **Persons Prohibited from Furnishing Bail Security.)** No attorney at law practicing in this State and no official authorized to admit another to bail or to accept bail shall furnish any part of any security for bail in any criminal action or any proceeding nor shall any such person act as surety for any accused admitted to bail.

110—14. § 110-14. **Credit for Incarceration on Bailable Offense.)** Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated prior to conviction except that in no case shall the amount so allowed or credited exceed the amount of the fine.

110—15. § 110-15. **Applicability of Provisions for Giving and Taking Bail.)** The provisions of Sections 110-7 and 110-8 of this Code are exclusive of other provisions of law for the giving, taking, or enforcement of bail. In all cases where a person is admitted to bail the provisions of Section 110-7 and 110-8 of this Code shall be applicable.

However, the Supreme Court may, by rule or order, prescribe a uniform schedule of amounts of bail in specified traffic and conservation cases, quasi-criminal offenses, and misdemeanors. Such uniform schedule may provide that the cash deposit provisions of Section 110-7 shall not apply to bail amounts established for alleged violations punishable by the fine alone, and the schedule may further provide that in specified traffic cases a valid Illinois chauffeur's or operator's license must be deposited, in addition to 10% of the amount of bail specified in the schedule. As amended by act approved Aug. 14, 1967. L. 1967, p. ——, S.B. No. 1168.

§ 3146. Release in noncapital cases prior to trial.

(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

(1) place the person in the custody of a designated person or organization agreeing to supervise him;

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

(b) In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

(c) A judicial officer authorizing the release of a person under this section shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform such person of the penalties applicable to violations of the conditions of his release and shall advise him that a warrant for his arrest will be issued immediately upon any such violation.

(d) A person for whom conditions of release are imposed and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed. A person who is ordered released on a condition which requires that he return to custody after specified hours shall, upon application, be entitled to a review by the judicial officer who imposed the condition. Unless the requirement is removed and the person is thereupon released on another condition, the judicial officer shall set forth in writing the reasons for continuing the requirement. In

the event that the judicial officer who imposed the conditions of release is not available, any other judicial officer in the district may review such conditions.

(e) A judcial officer ordering the release of a person on any condition specified in this section may at any time amend his order to impose additional or different conditions of release: *Provided,* That, if the imposition of such additional or different conditions results in the detention of the person as a result of his inability to meet such conditions or in the release of the person on a condition requiring him to return to custody after specified hours, the provisions of subsection (d) shall apply.

(f) Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law.

(g) Nothing contained in this section shall be construed to prevent the disposition of any case or class of cases by forfeiture of collateral security where such disposition is authorized by the court. Added Pub. L. 89—465, § 3(a), June 22, 1966, 80 Stat. 214.

APPENDIX B

BONDS WRITTEN IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

July, 1969 to December, 1969 (Inclusive).

District 1.

	NUMBER	AMOUNT
D-Bonds $25.00 or under	0	$ 0.00
D-Bonds over $25.00	40,640	38,819,695.00
C-Bonds $25.00 or under	62,554	1,563,014.00
C-Bonds over $25.00	1,114	171,738.00

District 2.

D-Bonds $25.00 or under	0	$ 0.00
D-Bonds over $25.00	3,630	3,776,650.00
C-Bonds $25.00 or under	5,151	128,703.00
C-Bonds over $25.00	501	103,295.00

District 3.

D-Bonds $25.00 or under	0	$ 0.00
D-Bonds over $25.00	5,054	5,531,950.00
C-Bonds $25.00 or under	6,493	162,292.00
C-Bonds over $25.00	2,122	579,688.00

District 4.

D-Bonds $25.00 or under	0	$ 0.00
D-Bonds over $25.00	2,910	3,456,925.00
C-Bonds $25.00 or under	4,648	116,139.00
C-Bonds over $25.00	1,186	279,703.00

District 5.

D-Bonds $25.00 or under	0	$ 0.00
D-Bonds over $25.00	4,835	4,902,000.00
C-Bonds $25.00 or under	6,170	154,240.00
C-Bonds over $25.00	1,078	354,547.00

District 6.

D-Bonds $25.00 or under	0	$ 0.00
D-Bonds over $25.00	6,231	6,116,940.00
C-Bonds $25.00 or under	4,324	108,077.00
C-Bonds over $25.00	922	203,112.00